law supplemented, where necessary, by Community law. The Community rules could not therefore, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State.

3. The rule in Article 79 (3) of Regulation No 1408/71, which is designed to prevent the overlapping of family allowances, is applicable only to the extent to which it does not, without cause, deprive the persons concerned of the benefit of a part of national legislation. When the amount of the allowance of which payment is suspended in one Member State is greater than that of the allowances received in another Member State by virtue of the pursuit of a professional or trade activity, it is therefore appropriate that the rule against overlapping of benefits should be applied only partially and that the difference between these amounts should be granted in the form of a supplement.

In Case 100/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail [Labour Tribunal], Charleroi, for a preliminary ruling in the action pending before that court between

CLAUDINO ROSSI, residing at 51 Via Tacconi, Bologna,

and

CAISSE DE COMPENSATION POUR ALLOCATIONS FAMILIALES DES RÉGIONS DE CHARLEROI ET NAMUR [Compensation Fund for Family Allowances for the Regions of Charleroi and Namur], 88 Rue de Marcinelle, Charleroi,

on the interpretation of Article 79 (3) of Regulation No 1408/71 of the Council of 14 June 1971, concerning the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, P. Pescatore and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and procedure

Claudino Rossi, an Italian national, born on 3 March 1924, after working in Italy from 1938 to 1948, came to work in Belgium as a labourer in the coal mines from 1948 to 1953, then in the iron and steel industry, from 1953 to 1958.

As he suffered from an occupational disease, he was granted a pension payable by a Belgian social security institution, calculated on the basis of a permanent invalidity of 52% from 13 May 1964 and of 100% from 11 December 1967.

He is the father of two children, Clelia, born on 28 October 1958, and Giuseppina, born on 23 March 1965, in respect of whom he received family allowances in Belgium until 28 February 1973, at which date he returned to Italy with all his family.

With effect from 1 March 1973 the payment of the family allowances was suspended by the Belgian institution — applying the provisions of Article 79 (3) of Regulation (EEC) No 1408/71 — on the grounds that the claimant's wife was pursuing a professional or trade activity in Italy such as to confer an entitlement to family allowances under the Italian legislation.

The applicant's wife therefore requested the Istituto Nazionale della Previdenza Sociale (hereinafter referred to as "the Istituto") to pay her family allowances in respect of her two children.

By a decision of 13 April 1976 the Istituto refused to grant them to her on the grounds that "the status of head of household for the purpose of family allowances in respect of the daughters belongs to the father and *cannot* be transferred to another person because the father *is not* [sic] an invalid or unemployed".

Faced with this refusal by both funds to pay him the family allowances for his two children, Mr Rossi took the case to the Tribunal du Travail, Charleroi, which by its judgment dated 19 April 1978 submitted to the Court two preliminary questions:

1. Is Article 79 (3) of Regulation No 1408/71 of the Council of the EEC made inapplicable by the fact that Italian legislation does not, for the purpose of granting family allowances, allow the capacity of head of household to be transferred to the wife when the husband is receiving a pension (Fonds des Maladies Professionnelles [Occupational Diseases Fund]) from another Member State?

   In other words, must the Belgian institution assume responsibility for paying family allowances even if a right exists in Italy by virtue of the pursuit of a professional or trade activity by a member of the family of the person receiving a pension but such right is imperfect owing to a particular feature of Italian legislation?

2. Assuming that the Italian authority's attitude is no longer justifiable at the present time in view of the principles of equal rights for men and women, should not the Belgian institution award the difference between the amount of the Italian family allowances in order to protect rights acquired under the legislation of the country of last employment and thus prevent unequal treatment of workers who have had to satisfy the same conditions to obtain the pension?

The judgment of the Tribunal du Travail, Charleroi, reached the Court on 27 April 1978.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted on behalf of Claudino Rossi by Daniele Rossini, Director of the welfare service "Patronato A.C.L.I." and C.S.C. trade union representative, on behalf of the Commission of the European Communities by its Legal Adviser, J. C. Seche, acting as Agent, on behalf of the Government of the Kingdom of Belgium by J. Dufour and on behalf of the Italian Government by Adolfo Maresca and Franco Favara. On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

(a) Observations of the applicant

First question

In the first place the applicant points out that the reason given by the Istituto for the refusal to grant family allowances under the Italian legislation on account of the wife's occupation is not entirely correct, since the Belgian Fonds des Maladies Professionnelles has recognized that the father suffers from 100% invalidity; he is therefore, without question, an invalid, but this status has been denied him by the Italian legislation.

None the less, he is in receipt of an income (a pension for occupational disease) which enables him to retain the status of head of household by virtue of Article 5 of the text of laws on family allowances consolidated by Decree No 797 of the President of the Republic of 30 May 1955, which provides that the children shall be regarded as dependent on the head of household when he ordinarily contributes towards their maintenance.

The applicant goes on to point out that this case is similar to Case 134/77, *Ragazzoni,* the judgment in which, delivered on 20 April 1978 ([1978] ECR 963), interprets Article 76 of Regulation No 1408/71.

Although they are drafted in different terms, Articles 76 and 79 (3) pursue the same aim, namely the prohibition of the overlapping of allowances when entitlement exists in two Member States. The only difference is that Article 76 refers to workers in actual employment and unemployed persons, whereas Article 79 deals with pensioners.

In the case submitted to the Court, since only the father, who is entitled to the pension for occupational disease payable by the Belgian insurance institution, can have the status of head of household under the Italian legislation, it is for the Belgian institution to assume responsibility for payment of the family allowances.

Therefore, in the applicant's submission, the Court should confirm the principle asserted in the *Ragazzoni* judgment.

Second question

Even if it is not evident from the judgment containing the reference, the second preliminary question is justified by the existence of the following provisions:

Italian Law No 903 of 9 December 1977, which came into force on 18 December 1977, establishing equality of treatment between men and women and allowing the wife to obtain family allowances instead of the husband;

The last paragraph of Article 60 of the consolidated Belgian legislation on family allowances for employed persons, consolidated by the Arrêté Royal of 19 December 1939 (Moniteur Belge of 22 December 1939), which provides that "if the family allowances due under under some other form of entitlement are less than those the granting of which is provided for by this law, a person who is entitled to rely upon this law may claim the difference".

Since the problem raised by this second question arises as from 18 December 1977, it is necessary to determine first of all how to interpret and apply the Italian law of 9 December 1977 in connexion with Articles 76 and 79 of Regulation No 1408/71, where a husband and wife can both establish entitlement to family allowances, one under the Italian legislation, and the other under the legislation of another Member State.

Article 9 of the aforementioned law provides that the wife "may" claim the family allowances "instead of" the husband. Must this provision be interpreted to mean that the wife *is obliged* to claim the family allowances in order that Article 79 (or Article 76) of Regulation No 1408/71 may be correctly applied? In other words, is it necessary to have exhausted all the possible means of obtaining the family allowances provided by the legislation of the children's country of residence before Article 76 or Article 79 ceases to be applicable?

The applicant considers that a national provision cannot be applied to a migrant worker if it is liable to impair rights acquired under the legislation of the country of last employment. The application of such a measure would be contrary to the aims of Article 51 of the Treaty which, in the context of the free movement of workers, ensures the payment throughout the Community of benefits acquired under the legislation of a Member State.

The question submitted by the Tribunal du Travail, Charleroi, is based by implication on the example of two workers who, within the same Member State, have had to satisfy the same conditions in order to obtain a pension for invalidity or occupational disease. If these two workers both reside in Belgium their children will receive family allowances under the Belgian scheme by virtue of the father's pension, regardless of the mother's situation: even if she is working or is herself in receipt of a pension, it is still the father who is primarily entitled to the family allowances: if, on the other hand, one of these two workers changes his place of residence to another Member State and the wife works there, the strict application of Article 79 (3) of Regulation No 1408/71 may result in the wife's activity prevailing over the husband's situation and adversely affecting the rights in the field of family

allowances which he derives from his status as a pensioner.

In order to remain consonant with Article 51 of the Treaty, Article 79 of Regulation No 1408/71 must not result in the rights of a migrant worker, who is in receipt of a pension, being adversely affected by the situation of his wife or of another member of the family in the event of a change of residence to another State.

The institution of the country liable to pay the pension must in any case guarantee the benefits provided for by the legislation which it applies, if those benefits are more favourable, subject to the right, in order to avoid double payments, to recover amounts awarded under the legislation of the country in which the children reside.

In order to reach this conclusion the applicant relies on the following arguments:

— The overlapping of entitlement to family benefits or allowances when the spouse is pursuing a professional or trade activity is governed in particular by Article 10 (1) of Regulation No 574/72, as amended by Regulation No 873/73. But this article seems to apply, in its current version, only where the family allowances are due under the legislation of a Member State whereby entitlement to these benefits is not dependent on conditions relating to insurance or employment, which is not the case here since both in Italy and in Belgium the granting of family allowances depends on the pursuit of a professional or trade activity or on entitlememt to a pension.

  The former version of the above-mentioned Article 10 operated by reference to the national rules for determining priority. This meant that the reference to the legislation of the State in which the members of the family were residing also implied the application of the rules establishing an order of precedence for the prevention of overlapping.

  This principle must remain valid in the context of the application of Article 76 or Article 79 of Regulation No 1408/71, with the result that, if the legislation of the children's country of residence provides that the father has the primary entitlement to family allowances and that the mother may, but is not required to, apply also for the allowances, the institution of the country liable to pay the pension must not consider itself discharged from its liability to pay the family allowances.

— Article 64 of the consolidated Belgian laws on family allowances provides that, where several persons are entitled to claim family allowances in respect of the same children, the prior right is accorded to the father. It appears from the present case that the father was last subject exclusively to the Belgian legislation. Therefore it is the status of the father as a rightful claimant which must prevail over the mother's, even if she may henceforth acquire the status of head of household under the Italian law of 9 December 1977.

— The last paragraph of Article 60 of the same consolidated laws expressly provides for the grant of benefits under the more favourable scheme. Consequently, in the event of family allowances being payable in Italy the Belgian fund must pay the difference between the family allowances provided under the Belgian scheme

and those provided under the Italian scheme.

— Both in Belgium and in Italy entitlement to family allowances is subject to conditions relating to insurance or employment. In the present case the right to the Belgian family allowances exists by virtue of the pension for occupational disease awarded in respect of work undertaken in Belgium. If one considers that benefits for occupational disease are granted, by virtue of Article 57 (1) of Regulation No 1408/71, exclusively under the provisions of the legislation of the last State in which the victim was exposed to the risk of occupational disease, and that the enjoyment of the Belgian family allowances is linked indirectly to the enjoyment of the invalidity pension granted by the Fonds des Maladies Professionnelles, the Belgian authority ought, in any case, on account of the connexion which exists between the two forms of benefit, to pay the family allowances provided under the Belgian scheme

The second preliminary question submitted by the Tribunal du Travail, Charleroi, might therefore be answered as follows:

"When the grant of benefits or family allowances depends on the grant of a pension, the application of Article 79 (3) of Regulation No 1408/71 cannot result in the entitlement to the benefits or family allowances due under the legislation of the State liable to pay the pension being affected by the application of a less favourable provision of the legislation of the children's country of residence."

(b) Observations of the Commission

First question

The Commission points out that Article 77 (2) of Regulation No 1408/71 specifies the rules whereby benefits are to be granted in respect of the dependent children of pensioners and by virtue of which such benefits are to be granted regardless of the Member State in which the beneficiary resides.

Applying this provision therefore, Mr Rossi is normally entitled to the family allowances, even after 28 February 1973, under the Belgian legislation.

The right to the benefits due under Article 77 is, however, suspended by application of Article 79 (3) "if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity."

The principle of prevention of overlapping rights to family benefits is the same as that of Article 76 of Regulation No 1408/71, relating to family allowances for workers and unemployed persons, which was recently applied in a judgment of 20 April 1978 (Case 134/77, *Ragazzoni,* [1978] ECR 963).

The only difference in the texts lies in the fact that Article 79 (3) provides for the case where the children "become entitled" to benefits, whereas Article 76 deals with the case where benefits "are also payable", which may be regarded as identical in substance.

By virtue of Article 1 of the legislation on family allowances of 30 May 1955 (Gazzetta Ufficiale, 7 September 1955, No 206 Suppl. Ord. 1955 — II p. 1370) such allowances are payable in Italy in respect of persons dependent on the head of household who, within the territory of that State, pursues a pro-

fessional or trade activity for reward in the service of another. Article 3 of that legislation regards the father, primarily, as head of household, the mother being able to assume this status only in certain cases.

In the case of Mr Rossi the fact that he is totally incapacited from working was not sufficient — in the view of the Istituto — to endow the mother with the status of head of household.

The Commission has considered the relevance, with regard to the Italian legislation, of the Istituto's decision since Article 3 (b) of the law of 30 May 1955 expressly refers to the case where the husband suffers from 100 % invalidity *(il marito invalido permanente al lavoro)* as one of the cases in which the mother is regarded as head of household.

However, the Commission is of the opinion that it is not necessary to insist on this objection, which would lead the Belgian court to examine the justification for the Italian decision and the Court of Justice to interpret Italian law, which lies outside its jurisdiction. Moreover such a situation would result in Mr Rossi's being deprived of his benefits in Belgium on the ground that the children have "become entitled" to these allowances in Italy, whereas the Italian institution has, by a decision which is enforceable in Italy, established that this is not so.

The Commission would abide by this decision and concludes that the answer given by the Court in the *Ragazzoni* case is appropriate for Mr Rossi and that the suspension, provided for by Article 79 (3), of the right to the family allowances payable under the provisions of Article 77 does not apply where the children have not become entitled to the family allowances "because the status of head of household is restricted to the father."

The Italian law of 9 December 1977 on equality of treatment for men and women in the field of employment (Gazzetta Ufficiale, 17 December 1977) has amended the text of the law of 30 May 1955 and states in Article 9 thereof: "The family allowances... for dependent members of the family may be paid alternatively (in alternativa) to a woman who is working or in receipt of a pension on the same conditions and subject to the same limitations as those laid down for a man who is working or in receipt of a pension. In the event of application being made by both parents, the family allowances for the dependent members of the family shall be paid to the parent with whom the child lives."

But the Court, in giving its ruling in the *Ragazzoni* judgment, stated that: "The suspension, under Article 76 of Regulation No 1408/71, of the entitlement to family benefits or allowances in pursuance of Article 73 of that regulation is not applicable when the father works abroad in a Member State whilst the mother is employed in the country in which the other members of the family reside and has not acquired under the legislation of the said country of residence a right to family allowances either because only the father is acknowledged to have the status of head of household or because the conditions for awarding the mother the right to payment of the allowances have not been fulfilled". The Court must have intended thereby to provide an answer covering this new legislation without expressly mentioning it.

In conclusion, the Commission considers that the first question should be answered as follows: "The suspension, provided for by Article 79 (3) of Regulation No 1408/71, of entitlement to allowances, payable under Article 77, in respect of dependent children of a father who is in receipt of a pension, is not applicable when the children have not become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the

pursuit of a professional or trade activity either because the mother has not been acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled".

Second question

It follows from this reply that the obligation to pay the family allowances falls upon the Belgian institution. Consequently no comparison is necessary between the Belgian amount and the presumably lower Italian amount.

However, on the assumption that, as a result of the combined effect of Article 77 (2) and Article 79, the family allowances paid in one Member State are lower than those which the beneficiaries could have claimed in another, there is no reason to proceed to a comparison of the amounts because Regulation No 1408/71 determines which legislation is applicable in the field of family allowances according to criteria which do not take any such comparison into account and without establishing any supplement designed to award to the recipients the highest amount provided for by the various laws which might be applied.

In these circumstances the Commission considers that the second question should be answered as follows: "Article 79 (3) of Regulation No 1408/71 does not provide that a competent institution which, in application of that provision, suspends payment of the benefits payable by it under Article 77, should grant a supplement to take into account any difference between the amount of the benefits which it has ceased to pay and those to which the children become entitled in another State, by virtue of the pursuit of a professional or trade activity".

(c) Observations of the Belgian Government

First question:

The Belgian Government points out in the first place that Article 79 (3) of Regulation No 1408/71 is applicable if in Italy there exists, in respect of the children, a right to allowances as a result of the pursuit of a professional or trade activity.

It goes on to observe that the Italian legislation provides that a working mother becomes intitled to family allowances in her own right if the father is an acknowledged invalid.

It is clear that, if a pension at a rate of 100 % has been granted on account of occupational disease, there can be no doubt about the state of invalidity and this state can be judged not by the Italian institution, but rather by the Belgian institution by which the pension is payable.

Consequently, as regards the first preliminary question, the Belgian Government considers that the father of the family, being an invalid within the meaning of the Belgian legislation, fulfils the conditions of the Italian legislation whereby the mother, who is herself working, may become entitled to the family benefits provided for by the Italian legislation.

Second question

The Belgian Government submits that no provision of the regulation establishes a right to a supplementary payment of family allowances to be provided by another country.

(d) Observations of the Italian Government

The Italian Government points out, in the first place, that when the Belgian institution suspended the award of family allowances, on Mr Rossi's return to Italy, on 28 February 1973, that decision "might constitute an infringement of

Article 77 (2) of Regulation No 1408/71, according to which the place of residence of the pensioner or his children is irrelevant".

However, this is only an indication because, in giving reasons for its refusal to pay family allowances, the Belgian institution did not rely upon the change of residence, but chose instead the pursuit of a professional or trade activity by Rossi's wife in Italy, although the documents do not indicate the date on which this activity began.

On a date not specified Mrs Rossi, whose husband was no longer drawing family allowances, applied to the Istituto for payment of them, basing her application on her own employment but by a decision of 13 April 1976, which was not challenged and is no longer subject to judicial review, the Istituto rejected this request on the ground that there was no basis for it under the Italian legislation then in force.

First question

Article 79 (3) constitutes a rule against the overlapping of benefits, the object of which is to "prevent entitlement to several family allowances arising" in respect of the same child. The application of this rule is subject to the actual existence of overlapping entitlement to several family allowances. If for any reason such overlapping does not occur Article 77 remains applicable.

Article 79 (3) creates a rule analogous to that contained in Article 76 of the same regulation. With regard to Article 76 the Court ruled in the *Ragazzoni* judgment that family allowances are due only when all the conditions imposed by national legislation are fulfilled and that prior to Law No 903 of 9 December 1977 the Italian legislation did not permit payment of family allowances to a working mother save by way of exceptions in certain specified cases.

Consequently it is sufficient for the principles declared by the Court in the *Ragazzoni* judgment to be applied to the present case. Moreover, since the decision of the Istituto of 13 April 1976, which cannot now be challenged, has — correctly according to the Italian legislation then in force — precluded the possibility of the Rossi children's becoming entitled to family allowances by virtue of the trade or professional activity pursued by their mother, the Belgian institution should merely note that there is in fact no overlapping of benefits such as is required for the suspension under Article 79 (3).

Second question

In the Italian Government's view the second question can concern only the period after 18 December 1977, on which date Law No 903 of 9 December 1977 dealing with equality of treatment for men and women in the social field came into force in Italy.

Strictly speaking, it is irrelevant because the proceedings before the Tribunal at Charleroi were commenced on 30 November 1976 and therefore well before 18 December 1977.

Nevertheless, the Italian Government is anxious to examine the second question. Whilst it is true that Article 79 (3) speaks of "suspension" and not of "reduction", which might suggest that the suspension must always be total, it must also be remembered that Article 3 (1) of Regulation No 1408/71 lays down the principle of "equality of treatment" for nationals of all Member States. It follows

that the decisive test for resolving the question raised lies in the rationale of the rules against overlapping of benefits. As those rules are designed solely to prevent unjustified enrichment a total suspension would be excessive in relation to that rationale and contrary to Article 51 of the Treaty.

Therefore Article 79 (3) should be interpreted as providing alternatively for total suspension or partial suspension, depending on whether the amount of the family allowances linked with the pension is less or greater than the amount of the family allowances which overlap them.

Moreover, the principle of the most favourable treatment of the worker is recognized in other provisions and in the preamble to Regulation No 1408/71.

In conclusion, this interpretation would give complete effect to the principle of equality of treatment to which the Belgian court rightly referred.

Indeed, without this interpretation, workers who have contributed at the same rate to the building up of funds for social security would receive different amounts of benefit as a result of circumstances which have nothing to do with social security.

For these reasons the Italian Government proposes that the Court should declare that:

"— Article 79 (3) of Regulation No 1408/71 contains a rule against the overlapping of benefits and it provides for the suspension of family allowances linked to pensions only where the children actually become entitled to other family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity.

— Article 79 (3) of Regulation No 1408/71 is valid only if it is interpreted as meaning that the suspension of family allowances linked to pensions may also be only partial and must be effected to the extent strictly necessary in order to prevent the unjustified enrichment of the recipient of the benefit".

III — Oral procedure

The hearing took place on 30 November 1978.

The *Commission* pointed out that the plaintiff in the main action, in his written observations, cited the last paragraph of Article 60 of the consolidated Belgian laws on family allowances. That provision states that, if the family allowances payable under some other form of entitlement are less than those for the grant of which provision is made by the said Belgian laws, the claimant is entitled to receive the difference. In those circumstances, if the Court were to decide to answer the second question, the Commission suggests that the judgment should not preclude the claimant from taking advantage of a national provision providing for a supplement. Just as in the field of pensions, according to the case-law of the Court, a national provision against overlapping of benefits may be applied where there is a reference to national legislation, in the same way where, as in this case, there is a reference to national law in the field of family allowances, it would be possible to apply a national provision granting a national supplement.

The Advocate General delivered his opinion at the hearing on 1 February 1979.

Decision

1 By a judgment of 19 April 1978, which was received at the Court Registry on 27 April 1978, the Tribunal du Travail (Labour Tribunal), Charleroi, submitted for a preliminary ruling, pursuant to Article 177 of the EEC Treaty, certain questions concerning the interpretation of Articles 77 to 79 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 These questions have been raised within the context of an action between the defendant, the Caisse de Compensation pour Allocations Familiales des Régions de Charleroi et Namur [Compensation Fund for Family Allowances for the Regions of Charleroi and Namur], and the plaintiff, an Italian worker, the father of two children and the recipient of a Belgian pension payable by the Fonds des Maladies Professionnelles [Occupational Diseases Fund] since 11 December 1967, on the basis of a permanent 100 % incapacity for work.

3 The plaintiff drew family allowances in Belgium paid by the defendant until 28 February 1973, on which date he returned to Italy with all his family.

4 On that date the Belgian institution suspended payment of the family allowances on the ground that, as the worker's wife was pursuing a professional or trade activity in Italy, she was entitled to family allowances, by virtue of the Italian legislation.

5 In fact, however, the plaintiff was refused payment of the family allowances by a decision, dated 13 April 1976, of the I.N.P.S. [National Social Security Institution], Bologna, on the ground that, according to the Italian legislation applicable at the time, the status of head of household, as regards entitlement to family allowances, belongs to the father and cannot be transferred to another person because the father is neither an invalid nor unemployed.

6 In these circumstances the Tribunal du Travail, Charleroi, submitted two questions, the first of which is as follows:

"Is Article 79 (3) of Regulation No 1408/71 of the Council of the EEC made inapplicable by the fact that Italian legislation does not, for the purpose of granting family allowances, allow the capacity of head of household to be transferred to the wife when the husband is receiving a pension (Fonds des Maladies Professionnelles) from another Member State?

In other words, must the Belgian institution assume responsibility for paying family allowances even if a right exists in Italy by virtue of the pursuit of a professional or trade activity by a member of the family of the person receiving a pension but such right is imperfect owing to a particular feature of Italian legislation?".

7 According to Article 77 of Regulation No 1408/71 a pensioner is entitled to the family allowances provided by the legislation of the Member State responsible for the pension, irrespective of the Member State in whose territory the pensioner or the children are residing.

8 Article 79 (3) of the same Regulation provides that the entitlement to family benefits or allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity shall suspend the right to benefits due under Article 77.

9 This rule against the overlapping of benefits has a purpose, and is applicable, only if entitlement to benefits actually arises and is acquired according to the legislation of the State in which the professional or trade activity is pursued.

10 Therefore, the answer to the first question should be that, under Article 79 (3) of Regulation No 1408/71 of the Council, the suspension of the entitlement to family allowances in respect of the dependent children of a father who is in receipt of a pension under the legislation of a Member State is not applicable if the mother has not actually become entitled to those same allowances under the legislation of another Member State by virtue of her pursuit of a professional or trade activity, either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

11 The second question submitted by the Tribunal du Travail, Charleroi, is as follows:

"Assuming that the Italian authority's attitude is no longer justifiable at the present time in view of the principles of equal rights for men and women, should not the Belgian institution award the difference between the amount of the Italian family allowances in order to protect rights acquired under the legislation of the country of last employment and thus prevent unequal treatment of workers who have had to satisfy the same conditions to obtain the pension?".

12 Since the answer to this question is not expressly determined by the regulations dealing with social security for migrant workers, it can be found only through the interpretation of those regulations in the light of the aims pursued by the provisions of the Treaty (Articles 48 to 51) under which they were made.

13 The regulations did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law.

14 The Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State.

15 One such exception is established by Article 79 (3) of Regulation No 1408/71 which provides that entitlement to benefits for dependent children of pensioners shall be suspended if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity.

16 That rule, designed to prevent the overlapping of family allowances, is applicable only to the extent to which is does not, without cause, deprive the persons concerned of the benefit of a part of the legislation of a Member State.

17 When the amount of the allowances of which payment is suspended is greater than that of the allowances received by virtue of the pursuit of a

professional or trade activity, it is therefore appropriate that the rule against overlapping of benefits contained in Article 79 (3) should be applied only partially and that the difference between these amounts should be granted in the form of a supplement.

18 Therefore, the answer to the second question should be that the rule contained in Article 79 (3) applies only to the extent of the amount actually paid by virtue of the pursuit of a professional or trade activity.

Costs

19 The costs incurred by the Commission of the European Communities, the Government of the Kingdom of Belgium and the Government of the Italian Republic, which have submitted observations to the Court, are not recoverable.

20 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunal du Travail, Charleroi, by judgment of 19 April 1978, hereby rules:

1. Under Article 79 (3) of Regulation No 1408/71 of the Council, the suspension of the entitlement to family allowances in respect of the dependent children of a father who is in receipt of a pension under the legislation of a Member State is not applicable if the mother has not actually become entitled to those same allowances under the legislation of another Member State by virtue of her pursuit of a professional or trade activity, either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

2. Article 79 (3) is applicable only to the extent of the amount actually paid by virtue of the pursuit of a professional or trade activity.

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 6 March 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 1 FEBRUARY 1979 [1]

Mr President,
Members of the Court,

1. The preliminary question which is submitted to you in the present case concerns the interpretation of one of the rules against the overlapping of benefits contained in Regulation No 1408/71, relating to social security for migrant workers: namely a provision of Article 79 (3) included in the chapter which deals in particular with family allowances for dependent children of pensioners.

The plaintiff in the main action, Mr Rossi, an Italian national, worked first in Italy, as an agricultural worker, and later in Belgium, as a labourer, from 1948 to 1958. As he suffered from an occupational disease, he was granted an invalidity pension from 1964, which is provided by the Belgian institution responsible for such benefits.

In addition to the pension, he received, likewise in Belgium, until February 1973, family allowances for his two daughters. But, from March 1973, the payment of the family allowances was suspended on the ground that, as the plaintiff's wife was working in Italy, she was entitled, in the Belgian institution's view, to receive the allowances for the children from the corresponding Italian authority.

Mrs Rossi then asked the Istituto Nazionale della Previdenza Sociale [National Social Security Institution] to pay her the allowances in question. However, the Istituto, by its decision of 13 April 1976, rejected the application, maintaining that "the status of head of household,' for purposes of family

1 — Translated from the Italian.